STATE OF MINNESOTA
IN COURT OF APPEALS
A22-0210

State of Minnesota,
Respondent,

vs.

Kristofer John Barndt,
Appellant.

Filed January 17, 2023
Affirmed
Johnson, Judge

Scott County District Court
File No. 70-CR-20-16217

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Ronald Hocevar, Scott County Attorney, Todd P. Zettler, Assistant County Attorney, Shakopee, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Charles F. Clippert, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Segal, Chief Judge; and Johnson, Judge.

NONPRECEDENTIAL OPINION

JOHNSON, Judge

A Scott County jury found Kristofer John Barndt guilty of second-degree assault with a dangerous weapon based on evidence that he held a knife to a woman's chest and threatened to kill her. We conclude that the district court did not err by excluding three

forms of evidence with which Barndt sought to impeach the victim's trial testimony. Therefore, we affirm.

FACTS

The events underlying this appeal occurred on November 22, 2020, at the Mystic Lake Casino. The jury's verdict rests principally on the testimony of S.H., who testified at trial as follows.

S.H. met and talked with Barndt while they were sitting next to each other at a blackjack table. They went outside together to smoke cigarettes. Because it was cold outside, Barndt asked S.H. if she wanted to sit inside his car in a nearby surface parking lot, and S.H. agreed. When she and Barndt were inside Barndt's car, he offered her marijuana, which she declined. He then tried to force her to take orange pills. When she refused to take the pills, Barndt threatened to shoot her with a gun that he said was in the trunk. Barndt then took a folding knife out of the center console, opened it, held the knife to S.H.'s chest, and threatened to kill her. S.H. was able to get out of the car and walked quickly back toward the casino, where she began to cry. When she returned to the same blackjack table, the dealer asked her what was wrong. She told the dealer what had happened in Barndt's car. The dealer reported the incident to the casino's security staff. Barndt also returned to the same blackjack table and briefly sat next to S.H. Casino security officers escorted S.H. to a nearby room to wait for police officers to arrive. After they arrived, S.H. gave a statement about what had occurred.

Meanwhile, Barndt had walked out of the casino. With the assistance of casino security officers, a police officer found him on the third-floor of the casino's parking ramp

and arrested him. At the county jail, Barndt waived his *Miranda* rights and answered an officer's questions. He initially denied all of S.H.'s allegations. But when the interrogating officer told him that his car would be searched, Barndt said that there "might be" marijuana and a knife inside his car.

The state charged Barndt with second-degree assault with a dangerous weapon, in violation of Minn. Stat. § 609.222, subd. 1 (2020). Before trial, the state filed a multi-part motion *in limine* to, among other things, exclude evidence of S.H.'s prior convictions, including a conviction of misdemeanor theft, and exclude evidence that S.H. told Barndt that she was on probation. The district court considered the state's motion *in limine* at the outset of trial. Barndt's attorney agreed that the state could redact S.H.'s reference to her probationary status from the transcript of the statement that she gave to a police officer. But Barndt's attorney stated that S.H.'s probationary status might become relevant during the trial. The district court deferred ruling on whether evidence of S.H.'s probationary status might be admissible and stated that Barndt could raise the issue later if he wished to offer such evidence. The district court also deferred ruling on the state's motion to exclude evidence of S.H.'s prior convictions.

The state's first witness was S.H., who testified as described above. After the prosecutor's direct examination of S.H., Barndt moved to impeach her with a prior conviction of misdemeanor theft for removing goods from a grocery store without scanning and paying for them at a self-checkout station. The district court denied Barndt's motion.

During the cross-examination of S.H., Barndt sought to introduce as an exhibit a restitution affidavit that S.H. previously had completed and filed but later had withdrawn. The state objected, and the district court sustained the objection.

The state proceeded to call four other witnesses: the police officer who responded to the casino's report and interviewed S.H., two casino employees with responsibility for security, and the police sergeant who interrogated Barndt at the county jail. The state also introduced into evidence an audio-recording of the sergeant's interview of Barndt. After the state rested, Barndt did not testify or present any other evidence.

The jury found Barndt guilty. The district court imposed a sentence of 21 months of imprisonment. Barndt appeals.

DECISION

Barndt argues that the district court erred by excluding three forms of impeachment evidence. We apply an abuse-of-discretion standard of review to a district court's evidentiary rulings. *State v. Zumberge*, 888 N.W.2d 688, 694 (Minn. 2017).

A. Prior Misdemeanor Theft Conviction

Barndt first argues that the district court erred by denying his mid-trial motion for leave to introduce evidence of S.H.'s prior conviction of misdemeanor theft.

Evidence that a witness has been convicted of a crime may be admitted to impeach the witness if the crime "involved dishonesty or false statement, regardless of the punishment." Minn. R. Evid. 609(a)(2). A conviction of gross misdemeanor theft "may or may not be" a crime involving dishonesty or false statement, "depending on what kind

of act of thievery was involved." *State v. Sims*, 526 N.W.2d 201, 202 (Minn. 1994) (order). Specifically,

> if the prior conviction was based on an act of shoplifting, *e.g.*, then it was not for a crime directly involving dishonesty or false statement, but if, for example, the prior conviction was for the act of swindle, then it was for a crime directly involving dishonesty or false statement.

Id. (comparing *State v. Norris*, 428 N.W.2d 61, 71 (Minn. 1988) (concluding that prior conviction of theft by swindle was crime involving dishonesty or false statement), with *State v. Darveaux*, 318 N.W.2d 44, 48 (Minn. 1982) (concluding that prior conviction of theft by shoplifting was not crime involving dishonesty or false statement)).

In this case, the district court indicated its familiarity with the caselaw and stated that S.H.'s prior misdemeanor-theft offense "appears to the court to be a shoplifting case." The district court also noted that the prior conviction was nine years old and that S.H. was only 18 years old at the time of the offense. The district court excluded the evidence for all of those reasons.

Barndt contends that the district court erred because it "improperly characterized [S.H.'s] 2012 theft conviction to be a simple shoplifting offense." He contends that the district court was wrong because S.H. "committed her theft by an act of deception." The relevant question is whether S.H.'s prior offense of misdemeanor theft was more like shoplifting or more like swindling. The record indicates that S.H. intentionally did not scan some items while at a self-checkout station at a grocery store. The district court reasonably characterized S.H.'s conduct as more similar to shoplifting than to swindling. S.H. surreptitiously removed goods from a grocery store without paying for them. It makes

little difference whether she did so by going through a self-checkout station or by by-passing all checkout stations, which is the conventional or traditional means of shoplifting. Because the district court was within its discretion in characterizing S.H.'s prior offense as akin to shoplifting, the district court's ruling is supported by *Darveaux*, in which the supreme court stated, "A conviction for misdemeanor shoplifting is not a conviction involving dishonesty or false statement within the meaning of Minn. R. Evid. 609(a)(2)." *See* 318 N.W.2d at 48.

Thus, the district court did not err by excluding evidence of S.H.'s prior conviction of misdemeanor theft.

B. Probationary Status

Barndt also argues that the district court erred by excluding evidence of S.H.'s probationary status.

In its responsive brief, the state notes that, at the outset of trial, Barndt's attorney agreed that the state could redact S.H.'s reference to her probationary status from the transcript of the statement she gave to a police officer, that the district court expressly stated that Barndt could raise the issue later if he wished to offer such evidence, and that Barndt never again raised the issue. The state is correct. Consequently, we will review the issue only for plain error. *See* Minn. R. Crim. P. 31.02. Under the plain-error test, an appellant is entitled to relief on an issue to which no objection was made at trial only if (1) there is an error, (2) the error is plain, and (3) the error affects the appellant's substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). If these three requirements are satisfied, the appellant also must satisfy a fourth requirement, that the error "seriously

affects the fairness and integrity of the judicial proceedings." *State v. Little*, 851 N.W.2d 878, 884 (Minn. 2014).

In this case, there is no error, let alone plain error. Barndt cites only one opinion in support of his argument. In that case, this court affirmed a district court's ruling to allow the state to cross-examine the defendant about his probationary status "to show that he had a motive to lie" because a conviction could result in the revocation of his probation. *State v. Johnson*, 699 N.W.2d 335, 339 (Minn. App. 2005), *rev. denied* (Minn. Sept. 28, 2005). The *Johnson* opinion is distinguishable because the witness at issue in that case was the defendant while the witness at issue in this case is the victim. Barndt nonetheless suggests that S.H. might have had an incentive to give testimony favorable to the state because she was on probation. But Barndt's trial attorney never made such an argument to the district court, so the state did not have an opportunity to present an opposing argument or to flesh out the record. Given that procedural history, the district court did not have a duty to admit evidence of S.H.'s probationary status even though Barndt's attorney agreed that the evidence should be redacted from an exhibit and never again raised the issue.

Thus, the district court did not plainly err by not admitting evidence of S.H.'s probationary status.

C. Restitution Affidavit

Barndt last argues that the district court erred by excluding evidence of the restitution affidavit that S.H. filed but later withdrew.

"For the purpose of attacking the credibility of a witness, evidence of bias, prejudice, or interest of the witness for or against any party to the case is admissible." Minn. R. Evid. 616. But such evidence is not always admissible.

> We recognize . . . that "not everything tends to show bias, and courts may exclude evidence that is only marginally useful for this purpose. The evidence must not be so attenuated as to be unconvincing because then the evidence is prejudicial and fails to support the argument of the party invoking the bias impeachment method."

State v. Larson, 787 N.W.2d 592, 598 (Minn. 2010) (quoting *State v. Lanz-Terry*, 535 N.W.2d 635, 640 (Minn. 1995)). Accordingly, a district court may exclude evidence of bias for the reasons stated in rule 403 of the rules of evidence. *See id.* at 598-99. Under rule 403, a district court may exclude otherwise relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Minn. R. Evid. 403.

Before Barndt's trial, S.H. filed with the district court an affidavit seeking restitution on the ground that she was "out of work" and expected to incur future medical and counseling expenses. Barndt argued to the district court that the document tends to show that S.H. had a financial interest in a successful prosecution. The prosecutor represented to the district court that, before trial, S.H. was informed that the state would not support her restitution request because she had not provided any documentation, which caused S.H. to withdraw her request.

In ruling on the state's objection, the district court noted that blank restitution forms "are sent to anyone who is an alleged victim to . . . be filled out on their own," that the form does not provide much information to victims, and that "it's relatively common that people make claims then find out later that they have to substantiate with documentation their claims." The district court reasoned that the document did not suggest bias because S.H. had withdrawn the request, and the district court also reasoned that the evidence would be unfairly prejudicial because no one had explained the document to S.H. before she filed it.

Barndt contends that the district court erred on the ground that the restitution affidavit "created a financial interest in the outcome of the case." But that contention ignores the fact that S.H. had withdrawn the restitution affidavit before trial, and there is no suggestion that S.H. intended to file another restitution affidavit after trial. Also, S.H. did not initiate the report to law enforcement that led to Barndt's arrest and charging; the casino's security officers did so. These circumstances indicate that the evidence was, at best, "only marginally useful" for impeachment purposes and "so attenuated as to be unconvincing." *See Larson*, 787 N.W.2d at 598 (quotation omitted). Furthermore, the district court was justified in reasoning that any probative value would be "substantially outweighed by the danger of unfair prejudice, [or] confusion of the issues." *See* Minn. R. Evid. 403; *see also State v. McAllister*, 939 N.W.2d 502, 508 (N.D. 2020) (holding that evidence of victim's interest in obtaining restitution was inadmissible pursuant to rule 403). Given the circumstances, the district court did not abuse its discretion by reasoning that the evidence was inadmissible.

Thus, the district court did not err by excluding evidence of S.H.'s restitution affidavit.

Before concluding, we note Barndt's fleeting reference to a constitutional right to present a complete defense. The United States Supreme Court has held that a state evidentiary rule may violate a defendant's constitutional right to present a complete defense if the rule "'infringe[s] upon a weighty interest of the accused and [is] arbitrary or disproportionate to the purposes [the rule is] designed to serve.'" *State v. Pass*, 832 N.W.2d 836, 841-42 (Minn. 2013) (alterations in original) (quoting *Holmes v. South Carolina*, 547 U.S. 319, 324-25 (2006)). But "evidentiary rules designed to permit the exclusion of unfairly prejudicial, confusing, or misleading evidence are unquestionably constitutional." *Id.* at 842 (quotations omitted). Barndt did not argue to the district court that evidence should be excluded based on a constitutional right to present a complete defense. On appeal, he has not argued with specificity that any particular Minnesota evidentiary rule is arbitrary or disproportionate to its purpose. *See id.* Rather, he appears to assume the validity of the Minnesota rules of evidence on which he relies. Accordingly, we need not further consider Barndt's suggestion that the district court's rulings violate his constitutional right to present a complete defense.

Affirmed.